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No. 97-156

Supreme Court, U.S.
FILED
JAN 9 1998
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RANDON BRAGDON, D.M.D.,

Petitioner,

v.

SIDNEY ABBOTT, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICUS CURIAE* OF THE PROMINA NORTHWEST HEALTH SYSTEM IN SUPPORT OF PETITIONER

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January 9, 1998

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae, Promina Northwest Health System is a community-owned and operated network of hospitals, physicians and services providing our communities with high-quality health services in a cost-effective manner. Our network includes Cobb, Douglas, Kennestone, Paulding and Windy Hill hospitals: PROMINA Northwest Physicians Group, Medical Centers; Neighborhood Healthcare Centers; Health Place; Health Services; Hospice; and Atherton Place. Promina Northwest submits this brief to supplement the argument made by petitioner on the issues of: whether HIV is a per se disability; and whether the courts should defer to the judgments of health care providers who treat persons who are covered by the Americans with Disabilities Act because of an infectious disease such as HIV. This is important to Promina Northwest because any decision will impact all health care providers associated with it.

SUMMARY OF ARGUMENT

Respondent brought this lawsuit against Petitioner, a dentist, when he refused to treat her in his office and fill a cavity in one of her teeth because she is HIV-positive. Petitioner then offered to treat Respondent at a local hospital, which Respondent refused. This litigation ensued. Although Respondent is asymptomatic and the HIV does

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[1] Petitioner and respondent have consented to the filing of this amicus brief. Their letters of consent are being lodged with the Clerk. Pursuant to Rule 37.6 of the Rules of the Supreme Court of the United States, Amicus Curiae hereby submits that its counsel authored the present brief and that no party other than Amicus Curiae made any monetary contribution to the preparation of submission of this brief.

not affect her in any life function such as caring for herself, walking, seeing, or hearing, she claims that she is disabled and afforded protection under the Americans with Disabilities Act ("ADA"). She alleges that her condition limits her in the major life activity of reproduction because she has chosen not to bear children.

Respondent's condition is neither a disability per se under the ADA nor is it a disability under the first prong of the ADA's definition of disability. Under that prong, she must show that her physical impairment substantially limits her in a major life activity. Her subjective belief that she should not bear children when there exists no physiological barrier to do so does not constitute a substantial limitation on the life activity of reproduction. Moreover, to hold that HIV is a disability per se means that the substantially limitation language contained in the definition is mere verbage when dealing with HIV-positive individuals.

HIV positive patients pose a direct threat to health care providers. That the risk of infection is low does not negate the catastrophic consequences should the health care provider contract HIV from an infected patient. Health care service providers are unique and deserve special protection under the ADA, particularly in the area of deferring to the reasonable medical judgments of those providers in treating individuals with infectious diseases, such as HIV.

ARGUMENT

I. RESPONDENT IS NOT COVERED BY THE AMERICANS WITH DISABILITIES ACT BECAUSE SHE DOES NOT HAVE A DISABILITY.

The ADA defines "disability" as follows:

> The term "disability" means, with respect to an individual—
>
> A. a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
>
> B. a record of such an impairment; or
>
> C. being regarded as having such an impairment.[2]

The definition "provides no express guidance as to whether an HIV infected person comes within the ambit of the Act."[3] Respondent argues that she has a disability as that term is used in the ADA. She does not have a disability.

The first prong of the definition of "disability" requires that Respondent show: (1) she has a physical or mental impairment; (2) that condition impairs a major life function; and (3) the impairment is a substantial limitation on that major life activity. Respondent has alleged that she

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[2] 42 U.S.C. § 12102(2). The definition of "disability" is substantially similar to the definition of "handicapped individual" contained in Section 504 of the Rehabilitation Act of 1973, which states that a "handicapped individual" is "[A]ny person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. § 706(7)(B).

[3] *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1319 (E.D. Pa. 1994).

is disabled because she has a physical impairment, asymptomatic HIV, that substantially affects a major life activity, reproduction.[4] Amicus Curiae does not dispute Respondent's allegations that asymptomatic HIV is a physical impairment, or her allegation that reproduction is a major life activity.[5] Respondent's subjective belief that she should not bear children fails to constitute a substantial limitation on reproduction when there is no physiological barrier to reproduction.

The definition of disability under the ADA is substantially similar to the definition of "handicapped

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[4] It is unclear from the opinion of the U.S. Court of Appeals for the First Circuit whether Respondent as asserted that she is disabled under the "regarded as" prong of the definition of disability. Because it has been alleged that being HIV-positive is a disability under the third prong of the definition, this Brief will address that aspect of the definition of disability as applied under Title III to persons who are HIV-positive.

[5] Whether reproduction is a major life activity is a hotly contested issue. There is a split among the courts whether reproduction constitutes a major life activity. The following cases have held that reproduction is not a major life activity: *Krauel v. Iowa Methodist Medical Center*, 915 F. Supp. 102 (S.D. Iowa 1995) (Reproduction is not a major life activity under the Americans with Disabilities Act—"We conclude ... that to treat reproduction and caring for others as major life activities under the ADA would be inconsistent with the illustrative list of activities in the [EEOC's] regulations and a considerable stretch of federal law."), *aff'd*, 95 F.3d 674 (8th Cir. 1996); *Zatarin v. WDSU-Television, Inc.*, 881 F. Supp. 240, 243 (E.D. La. 1995), *aff'd*, 79 F.3d 1143 (5th Cir. 1996). The following cases have held that reproduction is a major life activity: *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1404 (N.D. Ill. 1994); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, (E.D. Pa. 1994).

individual" under the Rehabilitation Act of 1973.[6] HIV-positive plaintiffs have brought cases alleging discrimination under both Acts, offering little or no explanation of how being HIV-positive substantially limits them in a major life activity or even the life activity that is affected by being HIV-positive.[7]

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[6] *Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.3d 55, 57 (4th Cir. 1995) (decided under Title I); *Tyndall v. National Educ. Ctr., Inc.*, 31 F.3d 209, 213 n. 1 (4th Cir. 1994). The definition of "handicapped individual" is set forth in footnote 2, *supra*.

[7] The EEOC regulations under Title I of the ADA state that an individual faces a substantial limitation when he or she is:

(1) The term substantially limits means:
(i) Unable to perform a major life activity that the average person in the general populations can perform; or
(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.
(2) The following factors should be considered in determining whether an individual is substantially limited in major life activity:
(i) The nature and severity of the impairment;
(ii) The duration or expected duration of the impairment; and
(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

29 C.F.R. § 1630.2(j). The EEOC unnecessarily confuses the issue of disability by using the term "impairment" which is also used in the definition of disability without providing a clear explanation between the manner in which it is used in the definition and how it is used in

And, although some courts have held that either HIV is not a disability per se,[8] or is not a disability at all,[9] the majority of the courts, the Equal Employment Opportunity Commission ("EEOC"), in its regulations under Title I of the ADA,[10] and the U.S. Department of Justice ("DOJ"), in its regulations under Title III of the ADA,[11] have all consistently held that HIV is a disability under both the Rehabilitation Act, and the Americans with Disabilities Act with no analysis of the substantial limitation

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explaining substantial limitation. The duration of the impairment apparently is intended to mean how long the person is prevented from engaging in the major life activity because of the physical or mental impairment.

[8] *See Ennis v. National Ass'n of Bus. & Educ. Radio, Inc.*, 53 F.2d 55 (4th Cir. 1995) (holding under Title I of the ADA that HIV-positive status is not a per se disability, but should, as with all physical and mental impairments, be determined on a case-by-case basis).

[9] *Runnebaum v. NationsBank of Md., N.A.*, 123 F.3d 156, 174 (4th Cir. 1997).

[10] The EEOC stated in its regulations, under Title I, that whether a physical or mental impairment substantially limits a major life activity is dependent on the effect on the particular individual in most cases. The regulation states that "Some impairments may not be disabling for particular individuals but not for others." Then the regulations states, without explanation, that "Other impairments, however, such as HIV infection, are inherently substantially limiting." 29 C.F.R. Pt. 1630, App. § 1630.2(j) (1996).

[11] The DOJ regulations list "HIV disease (whether symptomatic orasymptomatic)" as one among a number of diseases and conditions that constitute physical or mental impairments under the ADA without analyzing how asymptomatic HIV substantially limits a major life activity. *See* 28 C.F.R. § 36.104 (1)(iii).

requirement.[12] In the case of the EEOC and DOJ regulations being HIV-positive is a disability per se.[13]

Those regulations are contrary to the statutory language of the ADA and fail to give meaning to the substantial limitation requirement when dealing with HIV-positive individuals. The Act clearly requires an analysis of substantial limitation in determining whether a disease or condition is a disability. To hold otherwise in the case of HIV-positive individuals, and ignore the statutory language, would be tantamount to striking the substantial limitation language from the Act with respect to those cases.

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[12] The EEOC regulations state that HIV is a disability. 28 C.F.R. § 35.104(4)(l)(ii).

The following courts have held that HIV is either a handicap under the Rehabilitation Act or a disability under the Americans with Disabilities Act: *Gates v. Rowland*, 39 F.3d 1439, 1446 (9th Cir. 1994); *Harris v. Thigpen*, 941 F.2d 1495, 1522-24 (11th Cir. 1991) (HIV positive is a handicap under the Rehabilitation Act because the defendant regarded the plaintiffs, prisoners, as having a physical or mental impairment amounting to a handicap and treated all of them as such by segregating them and treating them differently); *United States v. Morvant*, 898 F. Supp. 1157, 1161 (E.D. La. 1995) (Both persons who have AIDS and are HIV-positive have a disability under Title III because the U.S. Department of Justice include them as disabilities in the Title III regulations; no analysis of definition of disability done); *Doe v. Kohn Nast & Graf, P.C.*, 862 F. Supp. 1310, 1319-21 (E.D. Pa. 1994) (This court analyzed that HIV is a physical impairment and that reproduction is a major life activity, but failed to indicate how the plaintiff was substantially limited in that major life activity).

[13] The decision to include asymptomatic HIV as a disability per se under the DOJ regulations was based on an opinion letter written by then Acting Assistant Attorney General in the DOJ's Office of Legal Counsel. 28 C.F.R. App. A § 36.104.

Respondent must, therefore, show that being HIV-positive substantially limits, i.e., significantly restricts, her ability to reproduce.[14] Respondent articulates no physiological reason that she is unable to reproduce. That she is HIV-positive does not preclude reproduction.[15]

Rather, she argues she is substantially limited in reproduction because she has chosen not to bear children. She has made this choice because she does not want to pass HIV to her child. This conscious choice to not engage in an activity that may amount to a major life activity cannot be what the drafters of the ADA intended to protect.

Respondent also has argued that she has chosen not to bear children because she would not be alive to raise those children. That reason does not impact on her ability to reproduce. At most, it impacts on the ability to care for others, which is not included in the illustrative list of major life activities.[16]

To allow persons to choose for themselves that some physical or mental impairment substantially affects reproduction would transform an objective standard into a subjective one. That standard should not be whether a person with any physical or mental impairment makes a

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[14] *Forrisi v. Bowen*, 794 F.2d 931, 933-34 (4th Cir. 1986).

[15] More than 7000 children per year are born to women who have tested HIV-positive. 43 Morbidity & Mortality Weekly Report 285 (1994).

[16] The U.S. Department of Justice regulations under Title III state that "major life activities means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 28 C.F.R. § 36.104(2).

conscious decision not to reproduce when no physiological reason precludes him or her from doing so. Such a standard would allow any person with a physical or mental impairment to claim he or she is disabled. For instance, an individual who has a history of diabetes, but is not substantially limited in a life activity, would be disabled under the ADA if she makes a conscious decision not to bear children because she might pass on the genetic trait of diabetes to those children. The same could be said about a number of other potentially genetically transmitted diseases.

The drafters of the ADA could not have intended to make a condition or a disease a per se disability solely because of the individual's choice not to reproduce. To hold otherwise, trivializes other disabilities such as blindness and deafness that are more akin to a per se disability because they are conditions over which the individual has no control and that clearly affect major life activities. This Court should hold that asymptomatic HIV is not a per se disability, and Respondent is not disabled under the ADA.

II. HIV-POSITIVE PATIENTS POSE A DIRECT THREAT OF HARM TO HEALTH CARE WORKERS AND DEFERENCE SHOULD BE ACCORDED THE PROFESSIONAL JUDGMENT OF THOSE WORKERS IN THEIR DECISIONS TO TREAT SUCH PATIENTS.

Under the ADA, a dentist's office, or any other place of public accommodation, must serve all disabled persons without reference to their disabilities unless the covered service provider is dealing with a person who "poses a direct threat to the health and safety of others."[17]

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[17] 42 U.S.C. § 12182(b)(3).

In the seminal case on this issue, this Court required in *School Board of Nassau County v. Arline*,[18] that the court should "achieve its goal of protecting handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns of grantees as avoiding exposing others to significant health and safety risks."[19]

In attempting to follow the *Arline* decision, the First Circuit defers to the judgment of public health officials and not health care professionals in determining the best available objective evidence regarding "direct threat." The court emphasized that the applicable regulations require a risk judgment based on "current medical knowledge or on the best available evidence."[20] The First Circuit found the best objective evidence for determining risk at the Center for Disease Control and accorded no deference to Dr. Bragdon's medical judgment. This Court held in *Arline* that "courts normally should defer to the reasonable medical judgments of public health officials."[21] What a court "normally" should do is qualified by Footnote 18 in the same case where this Court said "This case does not present, and we do not address, the question whether courts should also defer to the reasonable medical judgments of private physicians . . .."[22] The Court should now expand

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18 480 U.S. 273 (1987).

19 *Id.* at 287.

20 28 C.F.R. § 36.208(c).

21 480 U.S. at 288.

22 *Id.* at 288 n.18.

the *Arline* decision to include deference to private health care professionals.

The EEOC codified normalcy when drafting ADA regulations.[23] The First Circuit followed the codification on this issue of deference to public officials over the private medical judgments of health care professionals.[24] The court also ignored the uniqueness of health care in the scheme of public accommodation and the variant nature of HIV itself. In this HIV debate, public health officials should not be considered the final arbiter of what is objectively medically best and necessary because of the contingent and immediate nature of health care. In fact, at any given time public health officials may be the best, or the worst, people to determine "direct threat."

Take for example the facts in *Arline*. Public health officials were precisely the proper people to determine a significant risk. The events surrounding the case took place in a public school. The official duty of the public health workers in Nassau County was to protect the public health in a public situation where a contagious disease could be spread. It makes perfect and logical sense for a public health official to make determinations under those sets of facts. That is not the case when health care professionals are at work rendering service to the community. Health care professionals have independent knowledge and resources involving risk from their own professional experience, journals, seminars, and societies. The treatment of HIV in a health care situation shifts the risk of infection from the public to the health care worker.

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23 *See* 28 C.F.R. Pt.36, App. B § 36.208 (1996).

24 *Abbott v. Bragdon*, 107 F.3d 944 (1st Cir. 1997)

Competence and credibility do not always accompany public health determination. For example, at the initial outbreak of the AIDS epidemic public health officials refused to shut down bath houses in San Francisco in the face of political pressure. Public health officials are not immune from political pressure and influence in their pronouncements. Public policy should allow decision making on private health care issues by trained medical and dental professionals. The very nature of health care service necessitates the need for health care professionals to be free to make informed determinations of how, when, and where treatment takes place without yielding to the "prima facie force . . . of public health authorities."[25]

That the HIV virus changes and mutates makes treatment difficult and a cure distant. Accurate and available medical evidence today may not be accurate and available tomorrow. Health care professionals must be allowed to rely on all medical information and their professional judgment regarding the specifics of treatment.

If the statistics are right, the probability of contracting HIV by health care providers from an infected patient .3%.[26] However, "the factors that influence this

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[25] *Id.* at 945.

[26] D. Cardo, D. Culver, C. Ciesielski, P. Srivastava, R. Marcus, D. Abiteboul, J. Heptonstall, G. Ippolito, F. Lot, P. McKibben, D. Bell, the Centers for Disease Control, and Prevention Needlestick Surveillance Group, *A Case-Control Study of HIV Seroconversion in Health Care Workers After Percutaneous Exposure*, 337 N. Eng. J. Med. 1485, 1485 (1997).

risk are not well understood."[27] As of June, 1995, the Center for Disease Control had documented that 46 health care professionals had been infected with HIV on the job, and that another 97 health care workers who were HIV-positive had been infected as a result of occupational transmission.[28] Unfortunately, the person who consequentially falls in that statistically fatal .3%, dies!

In *Abbott* the First Circuit disregarded the risk claims of Dr. Bragdon as ". . . too speculative and tangential."[29] This evidences the utilitarian aspects of the court's ruling. The potential loss of a health care worker appears to be worth the price of Respondent having her teeth filled conveniently. Why? If this debate were solely on the issue of public health, the goal would be elimination of the health care threat, not the minimization of risks to the health care provider. Conversely, as a civil rights matter, some would contend that potential discrimination must be guarded against even at the risk of human life. Yet, health care professionals are singled out at a rate of approximately three in every thousand as a potential sacrifice on the altar of political correctness and expediency.

Amicus Curiae asks the court to revisit *Arline*, not only to decide the issue of whether the court should "also

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[27] *Id.*

[28] American Medical News, Feb. 5, 1996, <www.ama-assn.org/special/hiv/newsline/special/amnsty.htm>, at 3. The report indicates that the numbers of HIV-positive health care workers is probably under reported. *Id.* at 3-4.

[29] *Abbott*, 107 F.3d at 948.

defer to the reasonable judgments of private physicians,"[30] but to determine the fundamental fairness of forcing doctors, dentists, and other health care workers to take a small but deadly risk by the coercive force of law. Requiring a health care worker to treat a patient is not the same as mandating a business to provide access and service. A health care professional doing invasive medical surgery should not be held to the same standard as eating in a restaurant. Health care providers and HIV itself are unique. The law should recognize the distinction.

Under the Rehabilitation Act of 1973 a person could choose not to contract with the federal government or be involved with institutions receiving federal money and exempt themselves from compliance. Health care workers and professionals today either must take the state-mandated risk of HIV or quit their profession. If private professional judgment is used in a health care situation that fails to comport with a public health decree, health care workers and professionals risk being taken all the way to the Supreme Court of the United States over $185.00. The Respondent and those in support of her cause, appear to want HIV patients treated individually, the same as all other patients, while, at the same time, treating health care providers as fungible without individual rights of choice and self protection. The common law never required a person to rescue another at his or her own peril. The risk of HIV belongs to the professional health care worker. Courage, conscience, and calling should determine whether to take that risk, not the government.

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[30] *Arline*, 480 U.S. 288 n. 18.

CONCLUSION

Based in the foregoing, Amicus Curiae, Promina Northwest Health System, respectfully requests that this Court reverse the decision of the United States Court of Appeals for the First Circuit, and dismiss Respondent's claims.

Respectfully submitted,

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January 9, 1997